

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

EVELYN "PEACH" MURPHY, as Administratrix of the Estate of
ANDREW JOHN MURPHY, deceased,

Plaintiff,

v.

CIVIL ACTION NO. 06-C-151
Honorable Eric H. O'Briant

EASTERN AMERICAN ENERGY
CORPORATION, a West Virginia corporation;
KENNETH GREATHOUSE, a West Virginia resident;
RODNEY PAXTON, a West Virginia resident;
LOROTHY LEWIS, a West Virginia resident;
DENNIS LEWIS, a West Virginia resident;
THE JACK COMPANY, a Pennsylvania corporation;
S.W. JACK DRILLING CO., a Pennsylvania corporation;

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On the 15th day of February, 2007, the matter of Defendants, S.W. Jack Drilling Co.'s, Rodney Paxton's and Kenneth Greathouse's Motion for Summary Judgment, brought pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, came before this Court. The Court has studied the Motion, plaintiff's Response, other pertinent legal authorities, and heard the oral arguments of both parties presented at the hearing on this day. After deliberation, for the reasons set forth in this opinion, the Court **GRANTS** the Motion for Summary Judgment.

The Standard of Review

1. The Court first addresses the standard of review for motion for summary judgment. In West Virginia it is well established that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point

3, *Aetna Casualty & Surety Survey Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. “The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.” Syllabus Point 5, *Aetna, Id.*

3. “A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syllabus Point 6, *Aetna, Id.*

4. “A motion by each of two parties for summary judgment does not constitute a determination that there is no genuine issue as to a material fact. When both parties move for summary judgment each party concedes only there is no issue of fact with respect to his particular motion.” Syllabus Point 9, *Aetna, Id.*

5. “Summary Judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syllabus Point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

6. “If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, (3) submit an Affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” Syllabus Point 3, *Williams v. Precision Coil, Inc.*, 184 W.Va. 52, 459 S.E.2d 329 (1995).

7. “Roughly stated, a ‘genuine issue’ for purposes of West Virginia Rule of Civil Procedure 56 (c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syllabus Point 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

Findings of Fact and Conclusions of Law

1. Evelyn “Peach” Murphy has standing, as Administratrix of the Estate of Andrew John Murphy, to maintain the deliberate intent action pursuant to West Virginia Code §23-4-2(c). However, consistent with the statute and the decisions of *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000) and *Savilla v. Speedway SuperAmerica, LLC*, No. 33053 (Nov. 15, 2006), Ms. Murphy only has standing to maintain the deliberate intent cause of action on behalf of the persons who have a cause of action under the statute: widow/widowers, children and dependents.

2. The case of *Savilla v. Speedway SuperAmerica, LLC* recently decided on November 15, 2006, is controlling case law. The Court is advised and aware that a Petition for Rehearing on the decision was denied in January.

3. Under *Savilla*, the persons who can recover in a deliberate intent action are a limited class: the spouse, child or dependent may take in the case of a wrongful death action. *See also W.Va. Code §23-4-2(c)*

4. In *Savilla*, the West Virginia Supreme Court identified that a deliberate intent action is a statutory cause of action. This Court believes that the Legislature considered the issue

of beneficiaries and the limitations on who could recover under this statutory cause of action, and acknowledges that the Legislature could have expanded the parties who could recover in such an action if it so desired.

5. The limited class of beneficiaries in a deliberate intent action is one of the obvious tradeoffs for the Workers' Compensation system that the Legislature has enacted.

6. The Court does not find any violation of public policy in the limitation of beneficiaries by the Legislature, and further finds that the limitation of beneficiaries does not violate the Equal Protection clauses of the West Virginia or United States Constitutions. The statute rationally and lawfully narrows the class of recipients entitled to take under a deliberate intent action consistently with the persons who benefit under the Workers' Compensation scheme.

7. The plaintiff has failed to show the lack of a rational basis for the limitation of beneficiaries under the deliberate intent statute. *See, e.g. Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517 (2005).

8. The Court does not adopt plaintiff's argument to expand the list of beneficiaries to those who could recover under the wrongful death statute, West Virginia Code §55-7-6.

9. The plaintiff argues that Ms. Murphy is indeed a "dependent" under West Virginia Code §23-4-2(c) and, therefore, entitled to maintain a cause of action. For the reasons stated below the Court disagrees.

10. This Court finds that Ms. Murphy made a claim for dependents' benefits on March 16, 2006. The Court finds that the claim went to the Office of Claims Management and that a decision was communicated to Ms. Murphy in August, 2006 that she was determined not to be a dependent.

11. The denial letter sent to Ms. Murphy directly informs her of the right to protest the decision to the Office of Judges, and that this right, if exercised, would have resulted in further evidentiary hearings, cross-examinations, etc. The Court finds that if Ms. Murphy had received an adverse decision before the Office of Judges, she could have appealed the matter to the Board of Review (pursuant to West Virginia Code §23-5-10), and any adverse decision by the Board of Review could have been appealed to the West Virginia Supreme Court of Appeals (pursuant to West Virginia Code §23-5-15).

12. It is undisputed that Ms. Murphy did not protest the decision by the Office of Claims and, therefore, there is no record or appeal further on the issue.

13. The lack of an appeal by Ms. Murphy makes the decision by the Workers' Compensation Division final and not subject to collateral attack. *See W.Va. Code §23-5-1* ("Unless an objection is filed within the thirty-day period, the finding or action is final. This time limitation is a condition of the right to litigate and hence jurisdictional."). *See also Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998).

14. The Court finds there exists no other evidence in the record before it of other persons who could take under West Virginia Code §23-4-2(c). Although the prospect of a heretofore unknown child of Mr. Murphy has been raised, there is no evidence in this record of any child of Andrew John Murphy. It is uncontested that he is not married. As such, there are no persons before this Court who could recover deliberate intent damages under the statute and pursuant to the *Savilla* decision.

15. As there are no persons who can take under West Virginia Code §23-4-2(c) and pursuant to the recent *Savilla* decision, S.W. Jack Drilling Co. is entitled to summary judgment, and the plaintiff's claims for deliberate intent damages are dismissed from this action. The

named supervisors for S.W. Jack Drilling Company, Rodney Paxton and Kenneth Greathouse, are likewise entitled to dismissal of this action against them for these same reasons.

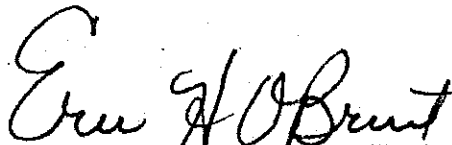
16. The Court makes no findings as to whether an infant child or other heir for Mr. Murphy does in fact exist.

17. S.W. Jack Drilling Company will remain as a defendant to Eastern American Energy Corporation's cross-claim in this action. Mr. Paxton and Mr. Greathouse are completely dismissed and their names are to be removed from the style of this case.

The objections and exceptions of counsel for the plaintiff are noted.

It is so ORDERED this 21st day of March, 2007.

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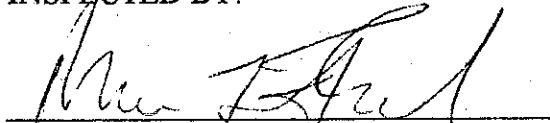
Eric H. O'Briant, Chief Judge

PRESENTED BY:

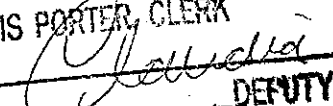


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